

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

September 16, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: August 6, 2004

Case No.: TIA-0155

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was employed as a janitor at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Applicant did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be granted and the application remanded to OWA.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. The Act provides for two programs, one of which is administered by the DOE.¹

The DOE program is intended to aid DOE contractor employees in obtaining workers' compensation benefits under state law. Under the DOE program, an independent physician panel assesses whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385(d)(3). In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not

¹ The Department of Labor administers the other program. See 10 C.F.R. Part 30; www.dol.gov.esa.

reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3). As the foregoing indicates, the DOE program itself does not provide any monetary or medical benefits.

To implement the program, the DOE has issued regulations, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The OWA is responsible for this program and has a web site that provides extensive information concerning the program.²

B. Procedural Background

The Applicant was employed as a janitor at DOE's Savannah River site. The Applicant worked at the site from 1992 to 1996. Record at 12.

The Applicant filed an application with OWA, requesting physician panel review of four illnesses. They were kidney disease, high blood pressure, sleep disorder, and asthma. The Applicant claimed that her illnesses were a result of her cleaning areas with "a lot of dust and other things," using cleaning chemicals, and cleaning areas with no ventilation. Record at 12.

The Physician Panel rendered a determination on three of the four illnesses. The Panel rendered negative determinations on the claimed kidney disease, hypertension, and sleep disorder. For the kidney disease, the Panel agreed that the Applicant had the problem, but found that there is no evidence of any exposures to any agents associated with renal failure.³ With regard to the high blood pressure, the Panel agreed that the Applicant had the problem. However, the Panel found that the toxic exposures at the DOE facility did not contribute to the development of the Applicant's hypertension. For the sleep disorder, the Panel stated that it was unknown whether the problem was one of insomnia or sleep apnea. In any event, the Panel found that toxic exposures at the DOE facility did not contribute to the disorder. The Panel did not consider the Applicant's claim of asthma as an illness.

The OWA accepted the Physician Panel's negative determinations: the negative determination on the kidney disease, the negative determination on the high blood pressure, and the negative determination on the sleep disorder.

In her appeal, the Applicant maintains that the negative determinations are incorrect. The Applicant contends that her illnesses are a result of her cleaning at the Savannah River site.

² See www.eh.doe.gov/advocacy.

³ The Panel stated that "renal failure has been associated with occupational exposures to lead, copper, chromium, tin, mercury, welding fumes, silicon-containing compounds, grain dust and oxygenated hydrocarbons." See OWA Physician Panel Report at 2.

The Applicant also claims that the Panel failed to consider her asthma.

II. Analysis

Under the Physician Panel Rule, independent physicians render an opinion whether a claimed illness is related to a toxic exposure during employment at DOE. The Rule requires that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12.

We have not hesitated to remand an application where the Panel report did not address all the claimed illnesses,⁴ applied the wrong standard,⁵ or failed to explain the basis of its determination.⁶ On the other hand, mere disagreements with the Panel's opinion are not a basis for finding Panel error.

In this case, the Applicant's argument on appeal—that her illnesses were a result of her cleaning the facility at Savannah River—is not a basis for finding Panel error. As mentioned above, the Panel addressed the claimed illnesses of kidney disease, high blood pressure, and sleep disorder, made a determination on each of those illnesses, and explained the basis of those determinations. The Applicant's argument on appeal is merely a disagreement with the Panel's medical judgment, rather than an indication of Panel error.

However, the Panel did not consider all of the claimed illnesses as required by the Rule. See 10 C.F.R. § 852.12. The Applicant claimed asthma in her application, but the Panel did not consider it. Accordingly, the application should be remanded to OWA for consideration of this claimed illness.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0155 be, and hereby is, granted as set forth in paragraph 2 below.
- (2) The application that is the subject of this Appeal is remanded to the Office of Worker Advocacy for further processing consistent with this decision.

⁴*Worker Appeal*, Case No. TIA-0030, 28 DOE ¶ 80,310 (2003).

⁵*Worker Appeal*, Case No. TIA-0032, 28 DOE ¶ 80,322 (2004).

⁶*Id.*

(3) This is the final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: September 16, 2004

